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No. 91

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R.,

Plaintiff, Appellant,

v.

ELIAS B. WILCOX,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION TO DISMISS AND BRIEF IN SUPPORT.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R. Plaintiff, Appellant, v. ELIAS B. WILCOX, Defendant, Appellee.	No. 342.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION TO DISMISS AND BRIEF IN SUPPORT.

Comes now *José R. F. Savage*, Solicitor for E. B. Wilcox, appellee, on behalf of the appellee, and respectfully moves the court to dismiss the appeal herein, upon the ground that the decree of the Circuit Court of Appeals is final and not reviewable in this court on appeal, and that this appeal was taken solely for delay.

ARGUMENT.

This case was commenced in the United States District Court for Porto Rico on June 9, 1914, (p. 2, record) by the filing of a bill in equity to foreclose an alleged mortgage held by the Bank on property alleged to belong to Wilcox. The jurisdiction of the district court was based solely upon the diverse citizenship of the parties, the bank being a Porto Rican corporation and Wilcox a citizen of the United States. After various pleadings and motions, testimony was taken, and decree of foreclosure entered August 25, 1916. (p. 34, record) Thereafter a bill of review was filed and dismissed by the court, and an appeal was perfected on February 24, 1917, by Wilcox, to the Circuit Court of Appeals, First Circuit. (pp. 71,72, record) That Court on December 3, 1917, entered its final decree as follows:

> "The decree of the District Court of Porto Rico is reversed and the case is remanded to that court with directions to enter a decree dismissing the bill and the appellant recovers his costs," (p. 99, record).

On February 27, 1918, the Bank filed its petition for an appeal to this Court alleging a final decree, matter in controversy in excess of $1,000, "and that this cause is one in which the decree of the Circuit Court of Appeals is not final, and is a proper cause to be reviewed by the Supreme Court of the United States on Appeal." (p. 99, record).

It has been repeatedly held in construing the provisions of Sec. 6 of the Act of March 3, 1891, 26 Stat. 828, which has been re-enacted as Sec. 128 of the Judicial Code that the decisions of the Circuit Court of Appeals are final where the jurisdiction of the trial court depended wholly upon the "diverse citizenship of the parties".

Arbuckle et al., v. Blackburn et al., 191 *U. S.* 405.

It is apparently the contention of the appellant in the case at bar that the phrase "diverse citizenship of the parties" must be restricted to that particular kind of of diverse citizenship defined in Sec. 128 of the Judicial Code, to wit, where the parties are "aliens and citizens of the United States, or citizens of different States", and that it does not apply to the case at bar, because, although the jurisdiction of the trial court depended solely on the diverse citizenship of the parties, one of the parties, the complainant and appellant, was a corporation organized and existing under the laws of Porto Rico, and was neither an alien, nor a citizen of a state.

But no other District Court of the United States, except the District Court for Porto Rico, would have jurisdicion, on the sole ground of diversity of citizenship of the parties, of any cases except such as are defined in Sec. 128, and where that is the sole ground of jurisdiction, the decisions of the Circuit Court of Appeal are final.

The District Court for Porto Rico, has since its organization been governed as to its jurisdiction and the appellate supervision of its decisions by special legislation of Congress. Its jurisdiction has always been broader than that of any other District Court. By the Act of April 12, 1900 (31 Stat. 85) it had "in addition to the ordinary jurisdiction of district courts of the United States jurisdiction of all cases cognizant in the circuit courts of the United States". By Sec. 3 of the Act of March 2, 1901 (31 Stat. 953) its jurisdiction was enlarged to include "controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars." This was the status of the law at

the time the suit at bar was instituted, and under which the District Court for Porto Rico had jurisdiction of the case. The jurisdiction of the court has since again been changed by Sec. 41 of the Act of March 2, 1917 (39 Stat. 965) whereby, in addition to the ordinary jurisdiction of a district court of the United States, it was given jurisdiction of all controversies "where all of the parties on either side of the controversy are citizens or subjects of a foreign State or States, not domiciled in Porto Rico, wherein the matter in dispute exceeds, exclusive of interest or costs the sum or value of $3,000; and of all controversies in which there is a separable controversy involving such jurisdictional amount and in which all of the parties on either side of such separable controversy are citizens or subjects of the character aforesaid."

The statutes governing the appellate review of the decisions of the District Court for Porto Rico were also of a special nature, and differed from those governing the review of decisions of any other District Court of the United States.

The Act of April 12, 1900 (31 Stat. 85) creating the Court, provided (sec. 35):

> "That writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same cases as from the supreme courts of the Territories of the United States, and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied..."

This provision was changed by the Act of March 3,

ERRATA.

p. 4, line 9. After the word "States" insert:
or citizens of a State, Territory or District of the
United States

1911, establishing the Judicial Code (sec. 244) to read as follows:

> "Writs of error and appeals from the final judgments and decrees of the supreme court of and the United States district court for, Porto Rico, may be taken and prosecuted to the Supreme Court of the United States, in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied, without regard to the sum or value in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars. Such writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error or appeals are taken to the Supreme Court of the United States from the district courts."

This section was repealed, and the appellate supervision of the court again changed, by the Act of January 28, 1915 (38 Stat. 804). This Act amended sections 128, 238 and 246 of the Judicial Code to read as follows:

> "Sec. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district courts for Hawaii and the United States district court for Porto Rico, in all cases other than those in which

appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the trade-mark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

"Sec. 238. Appeals and writs of error may be taken from the district courts, including the United States district courts for Hawaii and the United States district court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

"Sec. 246. Writs of error and appeals from the

final judgments and decrees of the Supreme Court of the Territory of Hawaii and of the Supreme Court of Porto Rico may be taken and prosecuted to the Supreme Court of the United States within the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a State in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and in all other cases, civil or criminal, in the Supreme Court of the Territory of Hawaii or the Supreme Court of Porto Rico, it shall be competent for the Supreme Court of the United States to require by certiorari, upon petition of any party thereto, that the case be certified to it, after final judgment or decree, for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such case unless the petition therefor is presented to the Supreme Court of the United States within six months from the date of such judgment or decree."

The same amendatory Act further provided in the same section making the foregoing amendments, and in a separate sentence:

"Writs of error and appeals from the final judgments and decrees of the supreme courts of the Territory of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent

witnesses, exceeds the value of $5,000, may be taken and prosecuted in the circuit courts of appeals."

The same question presented by the case at bar was raised in a case brought to the Supreme Court of the United States by writ of error to the Circuit Court of Appeals for the Ninth Circuit review the affirmance by that court of a judgment of the Supreme Court of the Territory of Hawaii. It involved no Federal question and there was no diversity of citizenship of the parties, as defined by Sec. 128 of the Judicial Code, but the writ was dismissed for want of jurisdiction.

Inter-Island etc. Co. v. Ward, 242 *U. S.* 1.

In the opinion of the Court the Chief Justice said: (page 2).

> "The argument supporting jurisdiction is that as, by general provisions of the Judiciary Act of 1891 (26 Stat. at L. 828, chap 517), now embraced in Sec. 241 of the Judicial Code (36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, sec. 1218), power exists in this court to review by error or appeal the final decisions of the circuit courts of appeals in all cases where the jurisdiction of the trial court did not depend upon diversity of citizenship, or where the case was not otherwise by provisions of law expressly made final in the circuit courts of appeals, therefore power to review exists, since this case is not in one of the excepted classes. But the contention overlooks the fact that from the beginning and continuously up to the adoption of the amendment of 1915, appeals and writs of error to the supreme courts of Hawaii and Porto Rico were not left to be controlled by the law generally applicable to courts of the

United States, as expressed in the judiciary act of 1891, or as found in the provisions of the Judicial Code, re-adopting that act, but were governed by special provisions controlling the subject,—a purpose which is exemplified by the terms of the amendatory act of 1915. This is plain when it is considered that the two classes of cases enumerated in the amendment of 1915 were practically in the same terms expressed in the prior acts, which conferred reviewing jurisdiction in both classes exclusively upon this court, and that the only substantial change made by the amendatory act was to take from this court the jurisdiction to review in the second enumerated class and confer it upon the circuit court of appeals to which Hawaii belonged. And, indeed, there is nothing in the context of the statute which countenances the view that the statute intended to merely take away the jurisdiction of this court in one class of cases, and, at the same time, to restore jurisdiction as to the same class by means of a power conferred or contemplated to exist to review on error or appeal the judgments and decrees of the circuit courts of appeals. Besides, as the remedy intended to be afforded by the amendment of 1915 was evidently the restricting of the jurisdiction of this court to the end that the burden on its docket might be lightened, we cannot construe that amendment as frustrating the purpose which it was adopted to accomplish."

The construction of these amendments contended for by the appellant in the case at bar would make final the judgments and decrees of the circuit courts of appeal in all cases depending wholly on the diversity of citizenship

of the parties *only* when the *diversity of citizenship* was such as specifically defined by Sec. 128 of the Judicial Code, while in all such cases where the diversity of citizenship was such as would give jurisdiction only to the district court for Porto Rico, under the present law, as well as under the former laws, the decision of the circuit court of appeals would not be final, but the losing party would be entitled, of right, to a further review by the Supreme Court of the United States. We respectfully submit that such cannot have been the intent of the amendment.

Nor can it be argued that as the case at bar arose under the former jurisdiction of the district court for Porto Rico that a decision permitting the review of this case would not imply any increase of the burden on the docket of the Supreme Court of the United States. The present jurisdiction of the district court for Porto Rico, based solely on diverse citizenship of the parties, as defined by Sec. 41 of the Act of March 2, 1917, *supra*, includes many classes of cases which would fall squarely within the same classes to which appellant contends the case at bar belongs, i. e. those which do not depend on the diversity of citizenship specifically defined by Sec. 128 of the Judicial Code, and yet, if appellant's theory be sustained, in all of those classes of cases (which could only arise in the district court for Porto Rico), and irrespective of the amount involved or the nature of the controversy, writs of error or appeals, as of right, would lie to the Supreme Court of the United States from the circuit court of appeals, thereby causing additional delay, and putting upon the litigants the burden of additional expense.

The proper construction of Sec. 128, we respectfully submit, is, that it was the intention of Congress to make the decisions of the circuit courts of appeals final in all

cases where the jurisdiction depended entirely on the diversity of citizenship of the parties.

American Secur. & T. Co. v. District of Columbia, 224 *U. S.* 491.

Church of the Holy Trinity v. United States, 143 *U. S.* 457.

It was undoubtedly the purpose of Congress, in giving the review of the decisions of the district court for Porto Rico to the circuit court of appeals, to lighten the burden on the docket of the Supreme Court of the United States, just as that was its purpose in giving the same power to the circuit courts of appeals over the decisions of the supreme courts of the Territory of Hawaii and of Porto Rico, and the construction of the amendments to the Judicial Code which sought to bring about this result should be the same in both classes of cases.

From the foregoing it will be seen that no case can be taken on appeal to the Supreme Court where the jurisdiction of the District Court was based solely upon the diverse citizenship of the parties. There is no suggestion anywhere in the record in this case that jurisdiction was based upon any other ground. An examination of the record will demonstrate that it does not fall within any of the classes specified in §238 of the Judicial Code. No constitutional or jurisdictional questions have been raised.

There being no right of appeal in this case, it must be that it was taken for delay only.

The appeal should therefore be dismissed with costs.

Respectfully submitted,

JOSE R. F. SAVAGE,

Solicitor for Appellee.

San Juan, Porto Rico.

September 24, 1919.